

Alaska Workers' Compensation Appeals Commission

Lee O. Stenseth,
Appellant,

vs.

Municipality of Anchorage,
Appellee.

Final Decision

Decision No. 208 January 27, 2015

AWCAC Appeal No. 13-023
AWCB Decision No. 13-0109
AWCB Case No. 199117984

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0109, issued at Anchorage, Alaska, on September 6, 2013, by southcentral panel members Ronald P. Ringel, Chair, Patricia Vollendorf, Member for Labor, and Amy Steele, Member for Industry.

Appearances: Robert A. Rehbock and Raymond Beard, Rehbock & Rehbock, for appellant, Lee O. Stenseth; Shelby L. Nuenke-Davison, Office of the Municipal Attorney, for appellee, Municipality of Anchorage.

Commission proceedings: Appeal filed October 4, 2013; briefing completed November 24, 2014; oral argument held on January 20, 2015.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The parties, appellant, Lee O. Stenseth (Stenseth), and appellee, Municipality of Anchorage (MOA), are before the Workers' Compensation Appeals Commission (commission) again, although on this occasion their status is reversed. In a prior appeal, MOA was the appellant and Stenseth was the appellee.¹ The primary issues in that appeal were: 1) whether Stenseth and MOA had entered a binding settlement agreement with respect to MOA's petition for reimbursement of workers' compensation

¹ See *Municipality of Anchorage v. Lee O. Stenseth*, Alaska Workers' Comp. App. Comm'n Dec. No. 194 (Apr. 11, 2014) (*Stenseth I*).

benefits that were improperly obtained; and 2) whether MOA breached that agreement. We held there was a binding settlement agreement that MOA breached.²

In contrast, the issue in this appeal is whether Stenseth is entitled to an award of attorney fees and costs against MOA which were incurred in attempting to enforce the settlement agreement once MOA breached it.³ In its decision, the Alaska Workers' Compensation Board (board) 1) held that Stenseth was not entitled to an award of attorney fees and costs from MOA, and 2) granted Stenseth relief from the attorney fees stipulation in which he agreed to pay his attorney.⁴ As a practical matter, given the board's holdings, if the commission upholds them, Stenseth's counsel would not be paid attorney fees from either the MOA or Stenseth.

2. Factual background and proceedings.

In order to provide context, we include the following factual recitation, excluding footnotes, which is adapted from the commission's decision in *Stenseth I*,⁵ with minimal revisions.

On June 15, 1991, Stenseth, while working for the Municipality of Anchorage, fell from some heavy equipment and injured his cervical spine. Six months later, on December 5, 1991, a surgical procedure consisting of a discectomy and fusion at C5-6 and C6-7 was performed on Stenseth's neck. He was subsequently released to work after recovery, but continued to experience pain.

On August 23, 1996, a Compromise and Release agreement (C&R) was approved in which Stenseth waived all workers' compensation benefits other than future medical benefits. Later that same year, he retired from work with MOA.

Stenseth continued to be treated with prescription narcotic medication. His last request to MOA for medical benefits, specifically prescription medication, was in November 2006. A police investigation in October and November 2006 revealed that Stenseth had been using false identifications and forged prescriptions to obtain and illicitly sell prescription pain medications. The forged prescriptions were based on prescriptions

² See *Stenseth I*, App. Comm'n Dec. No. 194 at 13-14.

³ See *Lee O. Stenseth v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 13-0109 at 1 (Sept. 6, 2013). The other issue decided by the board was that Stenseth should be relieved of a stipulation in which he agreed to pay his own attorney. See *Stenseth*, Bd. Dec. No. 13-0109 at 10.

⁴ See *Stenseth*, Bd. Dec. No. 13-0109 at 10.

⁵ See *Stenseth I*, App. Comm'n Dec. No. 194 at 1-5.

Stenseth was given for treatment of his work injury. On June 25, 2010, he pled guilty to seven criminal counts, including misconduct involving a controlled substance, and operating a scheme to defraud.

On April 23, 2012, MOA filed a petition with the board alleging Stenseth had obtained workers' compensation benefits by making false statements or misrepresentations and seeking reimbursement of all benefits paid as a result of the misrepresentations. Although the amount was uncertain, MOA alleged it was entitled to recover over \$130,000 in benefits provided to Stenseth since January 2001. On May 15, 2012, Stenseth answered the petition, denying he made misrepresentations for the purpose of obtaining benefits. On June 28, 2012, MOA filed an amended petition, however, it did not change the relief sought.

Prior to a mediation scheduled for November 9, 2012, the mediator sent the parties a letter which indicated they should attend the mediation with authority to settle or be able to obtain that authority. Both parties and their respective attorneys attended the mediation, although Law Henderson (Henderson), MOA's workers' compensation administrator, participated telephonically. Henderson believed he had authority to settle and that MOA's attorney had the authority to bind MOA to the terms of the settlement. The parties eventually reached a settlement with terms that each accepted, as evidenced by subsequent correspondence quoted below.

On November 13, 2012, MOA's counsel sent Stenseth's attorney a letter which stated in part:

This will summarize the settlement reached at mediation last Friday, November 9, 2012. As I understand the arrangement, MOA has agreed to accept either \$30,000.00 cash to be paid within 90 days from today or a Promissory Note for \$40,000.00 secured by a Confession of Judgment Without Action and a Deed of Trust on the home on east Foxtrot Avenue in Wasilla, Alaska in exchange for its waiver of the over \$125,000.00 it claims is due under AS 23.30.250(b). The note will be payable at \$500.00 per month and accrue interest at 3.5%. Mr. Stenseth is to commence these monthly payments immediately with the balance either in cash within 90 days or execute the Note, Confession of Judgment and have his daughter execute the Deed of Trust.

As you may recall, when the agreement was reached, I expressed the desire to hold off on a Compromise and Release until MOA was paid in full under either of the above methods as MOA was concerned it would otherwise be left with a significant reduction of the amount it claims is due and no money in the event of default. . . .

It was a long day on Friday and after pressure from you and Mr. Soule, I relented. I have since discussed the matter with Mr. Henderson today and spoken with you regarding that discussion. As I explained, Mr. Henderson prefers to either wait on the C&R until payment has been made OR make the agreement voidable at MOA's option in the event of

default. I should have confirmed this element with Mr. Henderson prior to leaving on Friday but did not. You claim this changes the terms of the settlement. I am not so sure. . . .

Please let me know by December 3, 2012[,] how you wish to proceed[.]

. . .

On December 5, 2012, MOA's attorney again wrote to Stenseth's counsel. The letter stated in part:

This will confirm MOA's response to your client's new settlement proposal. As I understand Mr. Stenseth's post-mediation offer, he would immediately tender \$25,000 in certified monies to MOA in exchange for a release of any further liability to MOA under AS 23.30.250. I have tendered Mr. Stenseth's proposal to my client and, as I explained, have been advised MOA wishes to maintain the previous settlement amounts verbally agreed to by the parties at the November 9, 2012 mediation. Thus, in exchange for \$30,000.00 in certified monies by February 22, 2013 (90 days from the November 13, 2012 letter of confirmation), MOA would execute any and all documents necessary for its full release of Mr. Stenseth from any further liability to MOA under AS 23.30.250.

On December 11, 2012, Stenseth's attorney wrote to MOA's attorney:

My client accepts your post mediation offer to pay \$30,000.00 by latest February 22, 2013 in exchange for a complete release of all rights and claims against Mr. Stenseth arising [out] of or in connection with AS 23.30.250.

In reliance on the December 4th offer and to assure his acceptance is fulfilled before the deadline, my client has arranged for the funds and I hold them.

We are prepared to tender in exchange for releases to be simultaneously filed with the Board, so to meet any requirements of AS 23.30.012.

Please accordingly provide draft for me to review for conformity. I will tender certified and/or my trust fund checks and/or cash to you personally in exchange the finalizing Board filing.

Early Monday morning, December 17, 2012, MOA's attorney sent an email to Stenseth's counsel stating: "Started working on [a draft of the settlement agreement] Friday. Should have [it] to you at the end of the day today." Later that same morning, MOA's attorney sent an email to Stenseth's attorney, which stated: "I've encountered a glitch here this morning – need to get higher ups to sign off. Higher ups demand closure of narcotics. Under circumstances that shouldn't be a problem, . . . right?" Later that morning, Stenseth's attorney responded to MOA's counsel's email: "We are done changing goal posts. Was very precise and the deal is done. Was explicit in terms and

acceptance due your first change of terms. . . . Later that morning, MOA's attorney replied:

I understand your frustration completely. Please accept my apologies. I just found out this morning that the settlement exceeds Risk Management's authority since it involves MOA's agreement to forebear recoveries of monies the dollar amount of which are in excess of Risk's authority. I did not realize Risk's settlement authority limits included forbearance of claims . . .

On or about December 18, 2012, Stenseth tendered two cashier's checks to MOA to cover the amount owing under the terms of the presumed settlement, which MOA rejected. That same day, Stenseth filed a petition to dismiss MOA's petitions for reimbursement on the basis that they were moot, given the parties' settlement.

On April 11, 2013, the board issued its decision. It dismissed MOA's April 23, 2012, petition, concluding that the parties had entered a binding settlement agreement. Under that agreement, Stenseth would pay MOA \$30,000.00 and MOA would forego further recovery. It found that MOA had breached that agreement when it refused Stenseth's tender of funds. In due course, MOA timely appealed the board's decision to the commission. We affirm the decision of the board.

As for the board's findings in its decision that is the subject of this appeal,⁶ with minimal paraphrasing, they are as follows.

On June 15, 1991, Stenseth fell from heavy equipment while working for MOA and sustained an injury to his cervical spine. A C&R was approved on August 23, 1996, in which Stenseth waived all benefits other than future medical benefits. He continued to be treated with prescription narcotic medication. His last request to MOA for medical benefits, specifically prescription medication, was November 2006. A police investigation in October and November 2006 revealed Stenseth had been using false identifications and forged prescriptions to obtain and sell prescription pain medications. The forged prescriptions were based on prescriptions Stenseth was given for treatment of his work injury.

On April 23, 2012, MOA filed a petition alleging Stenseth had obtained workers' compensation benefits by making false statements or misrepresentations and seeking reimbursement of all benefits paid as a result of the misrepresentations. The amount MOA has stated it was entitled to recover varied, but it has alleged the amount was as

⁶ See *Stenseth*, Bd. Dec. No. 13-0109 at 2-4.

high as \$176,000.00. On October 4, 2012, Stenseth filed a petition requesting he be allowed to pay his attorney directly. That same day, Stenseth's attorney filed an affidavit in support of the petition. The affidavit states in part:

. . .

2. Pursuant to 23.30.145 there is no basis under the Act for attorney fees to be paid by [MOA] if Mr. Stenseth prevails against the [MOA's April 23, 2012,] petition.
3. Therefore, [Stenseth] and the undersigned counsel seek an Order from the Board permitting [Stenseth] to pay his counsel's attorney fees.

On October 10, 2012, Stenseth signed a stipulation in support of the October 4, 2012, petition, stating in part:

2. On October 4, 2012, [Stenseth], through his counsel filed a Petition for Board Order permitting [Stenseth] to pay Robert A. Rehbock attorney fees pursuant to 23.30.260 because there is no basis for attorney fees to be paid pursuant to 23.30.145. . . .
3. The parties agree pursuant to 23.30.260 that the Board should permit Mr. Stenseth to pay directly Robert A. Rehbock attorney fees because even if Mr. Stenseth prevails in the above claim, the [MOA] is not responsible to pay Mr. Stenseth's attorney fees as a part of his benefits because there is no basis for attorney fees to be paid pursuant to 23.30.145.

. . . .

4. The parties have agreed to a mediation to be held on November 9, 2012[,] and if the parties do not resolve the matter through mediation, a hearing is scheduled for March 7, 2013.

Stenseth's attorney signed the stipulation on October 15, 2012; it was signed by MOA's attorney on December 4, 2012, when it was filed with the board.⁷ On December 11, 2012, the board issued an order approving the attorney fee stipulation stating "Employee, Lee O. Stenseth, is permitted to pay his counsel of record, Robert A. Rehbock, attorney fees pursuant to 23.30.260." On December 18, 2012, Stenseth filed a petition seeking to dismiss MOA's April 23, 2012, petition for reimbursement on the grounds the parties had entered a binding settlement agreement following mediation and that MOA had breached the agreement.

⁷ Exc. 158-160.

Despite the terms of the October 4, 2012, affidavit and the October 10, 2012, stipulation providing that Stenseth would pay his own attorney fees and relieving MOA of any obligation to do so, Stenseth filed a workers' compensation claim dated March 4, 2013, seeking an award of attorney fees from MOA. The claim stated in relevant part:

Employee is seeking attorney fees against Employer per AS 23.30.145(b) [for] fees incurred following Employer's breach of settlement agreement as of 12/17/2012. Employee seeks relief after the \$30,000 credit, so that employee is relieved of the remaining \$6,416.15 [in] fees. MOA is equitably entitled to a credit for the \$30,000 [in] fees paid by Employee. Employee seeks MOA to pay the \$ 6,416.14 in full satisfaction of its obligation per attached Affidavit of Attorney Fees dated 03/04/2013 & MOA would pay all remaining fees to Employee's counsel at his full rate for his legal representation[.]⁸

MOA filed an Answer to the claim dated April 2, 2013, denying liability for Stenseth's attorney fees.⁹

On April 11, 2013, a board decision was issued dismissing MOA's April 23, 2012, petition,¹⁰ finding the parties had entered a binding settlement agreement as of December 11, 2012, pursuant to which Stenseth would pay MOA \$30,000.00 and MOA would forego further recovery. MOA breached that agreement on or about December 18, 2012, when it refused Stenseth's tender of the agreed funds.

On July 2, 2013, Stenseth filed an affidavit of attorney fees and costs incurred from December 18, 2012, forward, detailing \$63,257.95 in attorney fees and \$1,660.45 in costs, for a total of \$64,918.40. Following a hearing on July 10, 2013, the board issued another decision in which it held 1) that Stenseth was not entitled to an award of attorney fees and costs from MOA; and 2) that Stenseth would be granted relief from the stipulation that he pay his own attorney for fees incurred from December 18, 2012, forward.¹¹

⁸ Exc. 001-02. The 1 cent discrepancy in the amount owed in fees, \$6,416.15 versus \$6,416.14, appears in the original.

⁹ Exc. 003-04.

¹⁰ *See Stenseth*, Alaska Workers' Comp. Bd. Dec. No. 13-0039 at 18.

¹¹ *See Stenseth*, Bd. Dec. No. 13-0109 at 10.

Stenseth appealed the board's decision insofar as it held MOA was not liable for his attorney fees.

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record. Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.¹² The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.¹³ We exercise our independent judgment when reviewing questions of law and procedure.¹⁴

4. Applicable law.

AS 23.30.012. Agreements in regard to claims.

(a) At any time after death, or after 30 days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, have the right to reach an agreement in regard to a claim for injury or death under this chapter, but a memorandum of the agreement in a form prescribed by the director shall be filed with the division. Otherwise, the agreement is void for any purpose. Except as provided in (b) of this section, an agreement filed with the division discharges the liability of the employer for the compensation, notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245, and is enforceable as a compensation order.

(b) The agreement shall be reviewed by a panel of the board if the claimant or beneficiary is not represented by an attorney licensed to practice in this state, the beneficiary is a minor or incompetent, or the claimant is waiving future medical benefits. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms conform to the provisions of this chapter, and, if it involves or is likely to involve permanent disability, the board may require an impartial

¹² See, e.g., *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

¹³ See *Wasser & Winters Co., Inc. v. Linke*, AWCAC Dec. No. 138, 5 (Sept. 7, 2010).

¹⁴ See AS 23.30.128(b).

medical examination and a hearing in order to determine whether or not to approve the agreement. A lump-sum settlement may be approved when it appears to be to the best interest of the employee or beneficiary or beneficiaries.

AS 23.30.145. Attorney fees.

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

...

AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.

(a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in

AS 11.46.180, and may be punished as provided by AS 11.46.120 – 11.46.150.

(b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170(b) and (c).

...

AS 23.30.260. Penalty for receiving unapproved fees and soliciting.

(a) A person is guilty of a misdemeanor and, upon conviction, is punishable for each offense by a fine of not more than \$1,000 or by imprisonment for not more than one year, or by both, if the person

(1) receives a fee, other consideration, or a gratuity on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court; or

(2) makes it a business to solicit employment for a lawyer or for the person making the solicitation with respect to a claim or award for compensation.

(b) Notwithstanding AS 23.30.145 and (a) of this section, approval of a fee is not required if the fee does not exceed \$300 and is a one-time-only charge to an employee by an attorney licensed in this state who performed legal services with respect to the employee's claim but did not enter an appearance.

8 AAC 45.050. Pleadings.

...

(b) **Claims and petitions.**

(1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits

under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.

...

(f) Stipulations.

...

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

...

5. Discussion.

a. Is Stenseth entitled to an award of attorney fees and costs?

The board, in its decision,¹⁵ and the parties, in briefing, have devoted considerable discussion to the very basic issue of what constitutes a claim for purposes of an award of attorney fees in workers' compensation cases. The board observed:

The interpretation of various sections of the [Alaska Workers' Compensation] Act is often complicated by the fact the word "claim" is used in two different contexts. "There is a distinction between the employee's right to compensation (called 'the worker's claim for compensation') and the pleading which must be filed if benefits are controverted (called 'a claim')." ¹⁶

Furthermore, the Alaska Supreme Court (supreme court) has long held that an employee's attorney fees are compensation for purposes of the Act.

"Compensation" is defined in the Act as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter." AS 23.30.265(8). AS 23.30.045(a) provides in part: "An employer is liable for and shall secure the payment to employees of the compensation

¹⁵ See *Stenseth*, Bd. Dec. No. 13-0109 at 6.

¹⁶ *Stenseth*, Bd. Dec. No. 13-0109 at 6, citing *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995). See also 8 AAC 45.050(b)(1).

payable under . . . [AS] 23.30.145. . . .” Alaska Statute 23.30.145 is the attorney’s fees provision in the Act, thus it follows that attorney’s fees are compensation in the context of employer liability. We conclude that the phrase “payable to an employee” in AS 23.30.265(8) does not limit “compensation” to payments made directly to the employee, but includes attorney’s fees paid on behalf of the employee.¹⁷

Relatively recently, the supreme court issued a decision, *Harnish Group, Inc. v. Moore*,¹⁸ in a case in which the board’s attorney fees award was also at issue. In its decision, the court reiterated that, for the purposes of an attorney fee award under AS 23.30.145(a), a claim refers to a written application for benefits, and to be liable for attorney fees under §.145(a), an employer must take some action in opposition to the employee’s claim after the claim is filed.¹⁹ The supreme court noted that in *Moore* the employer never filed a notice of controversion or controverted in fact the employee’s claim; instead, the employer admitted the employee was eligible for permanent total disability benefits and denied liability for his attorney fees.²⁰ The court held that, under the circumstances, the board erred in awarding Moore attorney fees under AS 23.30.145(a).²¹ The supreme court also held that Moore was entitled to an award of attorney fees under AS 23.30.145(b),²² the subsection of the attorney fees statute under which Stenseth is seeking an award.²³ The court held that, to be awarded attorney fees under §.145(b), the employee must demonstrate that: 1) the employer “otherwise resisted” the payment of benefits; and 2) the claimant “employed an attorney in the successful prosecution of the claim.”²⁴

¹⁷ *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1067 (Alaska 1991).

¹⁸ 160 P.3d 146 (Alaska 2007) (*Moore*).

¹⁹ *See Moore*, 160 P.3d at 152 citing *Jonathan*, 890 P.2d at 1124.

²⁰ *See Moore*, 160 P.3d at 151.

²¹ *See id.* at 152.

²² *See id.*

²³ *See n.8, supra.*

²⁴ *See Moore* at 153.

In this case, there is no question that Stenseth sought compensation in the form of an award of attorney fees against MOA in connection with his attorney representing him in the proceeding to enforce the settlement agreement that MOA had breached. He filed a written application for that compensation.²⁵ In other words, he made a claim for them. The issue then becomes whether he is entitled to an award of attorney fees under AS 23.30.145(b).

MOA “otherwise resisted” payment of those fees by filing an Answer denying liability for them and going to hearing before the board on that claim.²⁶ Thus, the first element identified by the supreme court in *Moore* is satisfied in this case. As for the second element, specifically, the board held: “Under AS 23.30.145(b), an employee may only be awarded fees after the successful prosecution of the claim. Where the only claim is for attorney fees, the employee faces a logical conundrum in that he can only be awarded attorney fees after he was successful in seeking an award of attorney fees.”²⁷ Based on this reasoning, the board declined to award Stenseth attorney fees.

In the commission’s view, the board has identified a possible anomaly in Alaska workers’ compensation law and its logic in denying an award of attorney fees to Stenseth’s counsel is understandable. Typically, workers’ compensation claims may include medical care and time-loss components, among others, and if a claimant has employed an attorney, an award of attorney fees is sought. Without an award of other compensation to Stenseth, perhaps the board felt constrained to deny him an award of attorney fees.

The commission is unaware of any Alaska case law authority directly on point. As an issue of first impression, it falls to the commission to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.²⁸ In the absence of relevant case law on the issue, we rely on interpreting and applying AS 23.30.145(b) in the

²⁵ Exc. 001-02.

²⁶ Exc. 003-04.

²⁷ *Stenseth*, Bd. Dec. No. 13-0109 at 9.

²⁸ *See Rivera v. Wal-Mart Stores, Inc.*, Alaska Workers’ Comp. App. Comm. Dec. No. 122, 7 (Dec. 15, 2009).

unusual circumstances in this case. When construing a statute, the supreme court instructs that we are to look at the language of the statute, its legislative history, and the legislative purpose behind the statute.²⁹

The purposes of §.145(b) are to encourage counsel to represent claimants and ensure that they are fairly compensated for their services. Here, Stenseth's counsel provided valuable legal services. He contested whether MOA breached the C&R and was ultimately successful in demonstrating that it did. Moreover, he negotiated and reduced the amount Stenseth would have to reimburse MOA and preserved his entitlement to future medical benefits.

Looking to the language of AS 23.30.145(b), it requires "the successful prosecution of the claim" for counsel to be awarded attorney fees, and in the last sentence, appears to differentiate between awards of attorney fees and awards of other compensation. Attorney fees awards are distinguished from and rely on awards of other compensation in order for there to be awards of attorney fees. As there was no other compensation awarded Stenseth, we understand it was on this basis that the board denied an award of attorney fees.

We agree with the board and as a matter of statutory interpretation, the commission concludes that unless compensation other than attorney fees is awarded, a claimant is not entitled to an award of attorney fees.

b. Is the board's decision granting Stenseth relief from the attorney fees stipulation at issue?

The board relieved Stenseth of his obligation under the stipulation to pay his own attorney fees, pursuant to 8 AAC 45.050(f)(3). The significance of this holding is that, when considered in combination with its holding that MOA is not liable for Stenseth's attorney fees, there is no source for payment of those attorney fees. As pointed out in

²⁹ See, e.g., *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010). However, the legislative history of a statute is to be considered only when construing an ambiguous statute. See *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 537 (Alaska 2002).

briefing,³⁰ Stenseth did not designate the attorney fees stipulation as an issue on appeal and MOA did not cross-appeal it. Moreover, the issue received little attention in briefing. However, MOA would have had no reason to litigate this issue because it would not matter to MOA whether Stenseth had to pay his own attorney or not, so long as MOA did not have to pay him. In the final analysis, the parties have not actively disputed nor adequately briefed the attorney fees stipulation issue in this proceeding before the commission. Accordingly, the commission considers the issue waived³¹ and declines to rule upon it.

6. Conclusion.

We AFFIRM the board's holding that MOA is not liable for Stenseth's attorney fees.

Date: 27 January 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

³⁰ See Appellant's Reply Br. at 2.

³¹ See *Kellis v. Crites*, 20 P.3d 1112, 1114-15 (Alaska 2001).

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).³² For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed³³ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration

³² A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

³³ *See id.*

decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of Final Decision No. 208, issued in the matter of *Lee O. Stenseth vs. Municipality of Anchorage*, AWCAC Appeal No. 13-023, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 27, 2015.

Date: January 28, 2015



Signed

K. Morrison, Appeals Commission Clerk